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In the Supreme Court of the United States

OCTOBER TERM, 1982

WILMER C. JORDAN
and SHELDON R. WAXMAN,

Petitioners,

v.

VICTOR MANEIKIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI OR IN THE ALTERNATIVE MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Is the refusal to reinstate a counterclaim, which was voluntarily dismissed in order to obtain a prompt trial, an appealable order?

Is it a violation of due process to assess costs on appeal under 28 U.S.C. § 1927 against appellant's lawyer without a hearing?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table Of Authorities	iv
Opinion Below	1
Jurisdiction	2
Statement	2
Reasons For Granting The Writ	3
I. Jordan	3
II. Sheldon R. Waxman	4
Conclusion	5
Appendix—	
Appendix A — Judgment Order	App. 1
Appendix B — Order	App. 3
Appendix C — Petition for Rehearing With En Banc Suggestion	App. 4
Appendix D — Jordan's Statement As To Need Of Oral Argument (Filed on April 27, 1982)	App. 10
Appendix E — Jordan's Second Motion To Set Oral Argument	App. 13

TABLE OF AUTHORITIES

Cases

PAGE

In re Marriage of Flaherty, ... Cal. 3d ..... (S.F. 24307, June, 1982) 4

Thomas K. Stewart and Sheldon R. Waxman v. SWP, Cert. Petition No. 81-1523 4

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

28 U.S.C. § 1927 ..... 2, 4

62 Stat. 928 2

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Petitioners pray that a Writ of Certiorari or in the alternative a Writ of Mandamus be issued concerning the judgment of the Court of Appeals for the Seventh Circuit entered on May 18, 1982.

OPINION BELOW

The Per Curiam published opinion of a panel of the Seventh Circuit can be found at ..... F.2d ..... (Docket No. 80-2528 May 14, 1982). A Petition for Rehearing En Banc (see Appendix) was filed on June 1, 1982 and was denied on June 16, 1982. See Appendix.

JURISDICTION

Jurisdiction is predicated on Title 28 U.S.C. Section 1254(1); 62 Stat. 928. The supervisory jurisdiction of the Court over inferior Courts of Appeal is also invoked. This appeal is taken within 90 days, less the time tolled by the Petition for Rehearing En Banc pursuant to 28 U.S.C. § 2101(c).

STATEMENT

In an interlocutory appeal (but one which had sufficient finality, under this Court's opinions*) a panel of the Court—convened only 2 weeks prior to issuance of the Per Curiam published opinion in an appeal already 2 years old, without oral argument**—gratuitously found that the appeal was frivolous and assessed costs under 28 U.S.C. § 1927 against the attorney.*** Wilmer C. Jordan petitions the Court with respect to the holding that his request for appellate review of a final decision that denied him reinstatement of his voluntarily dismissed counterclaim was from an unappealable interlocutory order.

Sheldon R. Waxman, Jordan's attorney, seeks review of that ruling which without a hearing imposed double costs on him for an alleged frivolous appeal.

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* See cases cited in the Appendix, "Petition for Rehearing with En Banc Suggestion."

** Although oral argument was repeatedly requested. See, Appendix.

*** Based on a theory that the attorney had foreknowledge that the appeal was from a nonappealable order.

REASONS FOR GRANTING THE WRIT

I.

JORDAN

In order to obtain a prompt trial on the Respondent's claim that the royalty agreement concerning his patented carburetor device was fraudulently induced, Jordan voluntarily dismissed his counterclaim, which accused the Respondent of tortiously destroying his business by the pursuit of sham and frivolous litigation and harassing discovery. The lawsuit was filed in 1974 and has never been tried. Respondent's counsel had claimed that it was necessary to take exhaustive discovery because of the counterclaim and it was because of that "needed" discovery that delayed the trial.

One year after (6 years after the lawsuit had been filed) the voluntary dismissal and no closer to a trial, Jordan requested reinstatement of his counterclaim. It was denied and he appealed in 1980. His appeal, without oral argument, after a lengthy discussion about whether it was appealable, was declared to be frivolous after 2 years of Appellate cogitation.

For the reasons stated in the Petition For Rehearing, etc. (see Appendix) the denial of the reinstatement of the voluntarily dismissed counterclaim was in error. Full briefing on this issue is required because the panel's decision conflicts with this Court's rulings on the subject.

II.

SHELDON R. WAXMAN

Without a prior hearing concerning a highly complicated legal matter the panel awarded double costs under Title 28 U.S.C. § 1927 against the lawyer. This is a new technique to silence obstreperous lawyers and interfere with attorney-client relationships and, therefore, should be reviewed by this Court in order to avoid additional embarrassment because of faulty logic.*

The California Supreme Court recently held that the issuance of fines against an appellate lawyer should be avoided, unless the circumstances are exceptional, because it would restrict access to appellate review. *In re Marriage of Flaherty,* ..... Cal. 3d ..... (S.F. 24307, June, 1982). Under *all* circumstances the Supreme Court of California stated the appellate courts must provide due process to the lawyer.**

Because of the failure of the Court of Appeals to provide even the most minimal due process protections, an alternative Writ of Mandamus*** to order an appellate hearing on the "frivolousness" issue is requested as an alternative remedy to complete review of the issues by this Court.

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* How can there be a finding that the lawyer *knew* the appeal was nonappealable unless he is provided a hearing. The stigma of "frivolous lawyer" is actionable in this due process violation against the judges who "stepped outside" their appellate function in this case. See, *Stewart and Waxman* v. *SWP*, No. 81-1523.

** This was not done here.

*** This would be an exercise of supervisory jurisdiction.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari or, in the alternative Mandamus, should issue.

Respectfully submitted,

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